STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ASHANTI K. WALTON,

Defendant-Appellant.

UNPUBLISHED
December 20, 2002

No. 235910
Wayne Circuit Court
LC No. 00-011325

Before: Bandstra, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Following a bench trial, defendant was acquitted of possessing an electronic stun device in violation of MCL 750.224a, but convicted of assault with intent to rob while armed, MCL 750.89. The trial court sentenced defendant to a term of three to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

This case arises from the attempted robbery of a Burger King. The sole employee present at the time of the crime, Khalilah Alston, identified defendant as the masked assailant who, while brandishing what was believed by Alston to be a stun gun, unsuccessfully demanded the restaurant's receipts for the night. On appeal, defendant argues that Alston's in-court identification of defendant was unduly suggestive because no lineup or other procedure for identification was employed prior to trial. Therefore, defendant argues, the in-court identification was not properly admissible because no independent basis for the identification was established at trial. We disagree. Because defendant did not object to the in-court identification at trial, we review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Initially, we note that the need to establish an independent basis for an in-court identification arises only where a pretrial identification is tainted by improper procedure or is otherwise unduly suggestive. See *People v Laidlaw*, 169 Mich App 84, 92; 425 NW2d 738 (1988). Here, however, defendant does not argue that a pretrial identification procedure was improper or unduly suggestive. Rather, defendant's argument is premised on the fact that no pretrial identification was ever conducted. A defendant, however, has no constitutional or statutory right to pretrial identification, *People v Farley*, 75 Mich App 236, 238; 254 NW2d 853 (1977), and there is no authority to support defendant's argument that a trial setting can itself be so suggestive that an in-court identification made by a witness must have an independent basis. Nonetheless, even assuming that the circumstances surrounding Alston's in-court identification

were suggestive, our review of the record indicates that the evidence at trial sufficiently demonstrated an independent basis for that identification under the factors set forth in *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977). Indeed, Alston testified that defendant was not a stranger to her, but was rather a coworker with whom she had worked for a period of at least three weeks before the crime. Alston further testified that, although masked, she quickly recognized defendant as the would-be robber based on her ability to view his eyes, mouth, and body stature at the time of the crime, as well as the fact that he twice called her by name during the course of the attempted robbery and offered to "cut her a deal" if she did not tell. Where, as here, there is substantial, reliable testimony that identifies defendant and clearly constitutes an independent basis, an allegedly unduly suggestive viewing is not outcome determinative and reversal is, therefore, not warranted. See, e.g., *People v McCray*, 245 Mich App 631, 639-641; 630 NW2d 633 NW2d (2001).

Defendant also argues that the trial court's finding that the evidence was insufficient to support a conviction for possessing an electronic stun device required that it also acquit defendant of assault with intent to rob while armed. Specifically, defendant argues that the trial court's finding in this regard precluded a finding that defendant was "armed" for purposes of a conviction under MCL 750.89. Again, we disagree.

Contrary to defendant's assertion, proof of the offense of assault with intent to rob while armed does not require proof that the accused in fact possessed a weapon. Proof that a defendant possessed an article that, although harmless in and of itself, was "used or fashioned in a manner to lead [the] person so assaulted reasonably to believe it to be a dangerous weapon" is sufficient to support the conviction. MCL 750.89. See also MCL 750.529 (using identical language to define the offense of armed robbery) and *People v Jolly*, 442 Mich 458, 468; 502 NW2d 177 (1993) (citing the use of a toy gun as an example that satisfies the feigned weapon element of armed robbery). In contrast, a conviction under MCL 750.224a requires proof that the accused in fact possessed a device "from which an electric current, impulse, wave or beam may be directed . . . ." As such, the trial court could properly conclude that although the evidence was insufficient to support that defendant in fact possessed a device prohibited by MCL 750.224a, it was nonetheless sufficient to support Alston in reasonably believing that defendant was so armed and that, therefore, defendant had acted in a manner proscribed under MCL 750.89.

We affirm.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Patrick M. Meter